

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,) Docket No. 3:06-CR-719
Plaintiffs,) Toledo, Ohio
v.) April 22, 2008
MOHAMMED AMAWI, ET AL.,)
Defendants.)

TRANSCRIPT OF JURY TRIAL, VOLUME 32
BEFORE THE HONORABLE JAMES G. CARR
UNITED STATES DISTRICT JUDGE

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1 THE COURT: Shall we get started? Ready to go?

2 MR. SOFER: Yes.

3 THE COURT: Why don't -- I assume everybody had
4 gotten Mr. Sofer's E-mail from this morning. Why don't we
5 just go down the list there and see if that's okay --

6 MR. HARTMAN: Sure.

7 THE COURT: -- on the stipulations?

8 MR. SOFER: Two issues with respect to the
9 stipulations, Your Honor. First of all, we encountered a
10 problem with the stipulations relating to a number of the
11 definitions, probably a significant number of them; and the
12 fact that the definitions that are in there are either
13 factually problematic from a policy standpoint or otherwise
14 as far as -- obviously, the Government -- United States
15 Government, not us here in the courtroom, has an interest
16 in making sure that we don't stipulate to facts which the
17 government does not agree with. And some of these are
18 national, international and other kinds of issues. We are
19 trying to work through that now with our headquarters in
20 Washington, see if we can't come up with an answer that --

21 THE COURT: Let me ask you this: Will you at
22 least consider my noting your objection? If there's some
23 changes that can be made, making them and simply meeting
24 then without the word stipulation in there and saying to
25 the jury in this case and only in this case, these

1 definitions, these terms --

2 MR. SOFER: That's exactly the kind of thing we
3 are trying to work out, some sort of preamble or a
4 cautionary instruction where we would say something very
5 similar to that.

6 THE COURT: I understand you don't want to be
7 judicially stopped somewhere down the road.

8 MR. SOFER: We're not going to be stopped. As an
9 example --

10 THE COURT: U, the capital U, United, capital S,
11 capital G, Government.

12 MR. SOFER: There are some specific and sensitive
13 issues in these stipulations. One example would be the
14 Russian -- the Russian Government's actions in Chechnya.
15 For us to stipulate something that is contrary to United
16 States foreign policy, for instance, or a stated position
17 of the United States Government, I think, is for obvious
18 reasons problematic.

19 THE COURT: I have no problem uttering something
20 that might be contrary to United States foreign policy. In
21 fact, if we can work it out that way, work it out that way.

22 MR. SOFER: I understand Your Honor doesn't have
23 that problem.

24 THE COURT: I've got to step off the bench.

25 (Judge stepped down.)

1 (Judge back.)

2 THE COURT: I gather that's all we can do about
3 that now.

4 MR. SOFER: It is. And I think we may be able to
5 work that out. There's a second piece, though, Judge. It
6 makes no sense from the Government's standpoint to use the
7 word stipulate or agree or otherwise go forward with these
8 definitions if, in fact, there's going to be a defense
9 expert who comes up and testifies, elaborates, undermines
10 what it is that we've agreed on.

11 THE COURT: That's fair. At least my objective
12 is to finish some of the issues regarding Mr. Kohlmann.

13 MR. SOFER: Understood.

14 THE COURT: Let me ask the defense if that -- I
15 mean, I give the stipulations as -- present these
16 definitions. Whenever I say stipulation, I mean
17 definition.

18 Again, if I instruct the jury as to these
19 definitions, will that be the end of it in terms of
20 evidence as to what any of those terms mean?

21 MR. WHITMER-RICH: For the Amawi team, our
22 position is that we have designated experts that we wish to
23 call to present evidence in our case. Those experts are
24 qualified and, I think, competent to -- subject to whatever
25 hearings the Court wants to have -- to testify as to those

1 matters. We think that the matters of their testimony are
2 extremely important to the jury's understanding of the
3 case, and we -- I was reviewing the final set of
4 stipulations last night.

5 We still have a number of objections, not 100,
6 but to some of the terms; and it seems likely that I'm not
7 sure -- it seems unlikely to me that we will reach a
8 definition of Abu Ghraib that will be acceptable to the
9 United States Government.

10 THE COURT: Why do we need Abu Ghraib in there at
11 all? People -- Abu Ghraib, what does that have to do with
12 anything? It was mentioned a few times.

13 MR. WHITMER-RICH: I don't need a stipulation as
14 to Abu Ghraib.

15 MR. SOFER: I think this is more sort of
16 generally the question we've described from the beginning
17 is without -- without some definition of the terms that are
18 included within the conversations -- of course, the
19 conversations have a context to them, a meaning -- you end
20 up with -- I don't -- although I certainly -- many of us
21 have heard -- I don't know based on the jury
22 questionnaires. I think there's at least some possibility
23 that some of the jurors don't know what Abu Ghraib is.
24 It's certainly not critical to the Government's case; but
25 as it becomes a slippery slope, I mean, the notion, again,

1 when we are carrying the burden.

2 THE COURT: Does anybody have a current version
3 of these? Anybody? Or can somebody go out and get one,
4 E-mail it to me; and I'll E-mail it to my office and get it
5 printed?

6 MR. WHITMER-RICH: I can E-mail it.

7 MR. SOFER: In any event, Judge, what the
8 Government's position is, we -- we'll pursue this with the
9 powers to be on our end. I think we probably can resolve
10 it, but it sort of -- I think there's a waste of
11 everybody's time if it turns out we're going to end up --

12 THE COURT: I would agree. If I tell them that
13 these terms mean this and somebody comes in and starts
14 talking about varying meanings, then this whole exercise is
15 futile.

16 MR. SOFER: And we hope that that's not true,
17 Judge; and I've already indicated my reservations, his
18 testimony about his mom and certain other geo-political
19 background.

20 THE COURT: If you E-mail that to me, I will --

21 MR. SOFER: Maybe, Judge, one way to proceed
22 would be -- and again, we've not received final reports, I
23 don't believe, for any defense expert. And one way
24 possibly to proceed, although we're certainly not going to
25 get this done by tomorrow, would be to have the Court

1 decide -- we'd like a ruling on the expert testimony, both
2 for the progress of the Government's case and also this
3 issue. We could brief it quickly.

4 I'm comfortable going forward orally on any
5 number of -- of these issues if that's how the Court wishes
6 to proceed. We'll do this however Your Honor wants to.
7 But we -- I think at this juncture, it's in the interest of
8 both parties to have a resolution of the expert testimony
9 that should go to affect the progress -- and Government's
10 agreed upon definitions to the extent we can do it.

11 THE COURT: It looks as though the earliest
12 available time I would have is Monday evening, again,
13 starting at 4:30, 5:00. I've got start at 8:00 or 8:30
14 that day and half-hour intervals the entire day.

15 And have you responded, except orally, to the --
16 I think, the three reports that have been provided by the
17 defense?

18 MR. SOFER: We've been given either summaries --
19 I'm not sure we satisfied the rule either, but we've been
20 given summaries and/or what I think have been described as
21 preliminary reports for I believe it's three experts from
22 the Amawi side and two from El-Hindi. I may have those
23 numbers --

24 MR. WHITMER-RICH: For the Amawi side, we had
25 three experts that we had listed their names on April 1st.

1 One of them we will not now be using, so we have two
2 experts; and we provided summary reports that we believe
3 comply with the requirements of Rule 16. And we -- we're
4 not intending unless the Court -- otherwise, to provide
5 some issue with the report. We believe that we've
6 satisfied some requirements of the rule, provide the
7 summary of the proposed testimony.

8 MR. HARTMAN: We intend -- our reports, according
9 to our understanding, was the Court ordered to at least get
10 a preliminary report by the 14th. We intend to get a more
11 comprehensive and final report to the Government as soon as
12 we can get that. It depends on the expert. The computer
13 guy, it's going to be a while, because he's still got a ton
14 of work to do. The translators should be fairly easy and
15 maybe within the next week. But we intend to supplement
16 what we gave the Government already.

17 MR. WHITMER-RICH: I guess an additional expert
18 potentially is the translator that we may share in common
19 is the purpose that we will use that translator for will be
20 to simply get up and testify as to the authenticity of the
21 transcripts that that translator provides. So we'll be
22 working with the Government to disclose those clips that we
23 want to use. But apart from that, I'm not sure that
24 there's -- that a report serves --

25 THE COURT: Why would you need that? Is there

1 any dispute about the authenticity? Accuracy is a
2 different thing. Authenticity is simply --

3 MR. WHITMER-RICH: I might have used the wrong
4 word. Sorry. As to that expert, we weren't really
5 thinking in terms of a report. We weren't simply going to
6 turn over work product; that is, translations,
7 transcriptions, which we've done already a little bit. But
8 just for the record that -- that is, I suppose, an expert
9 that we're calling, but we're not proposing a report. That
10 expert can offer an opinion beyond simply -- beyond the
11 accuracy.

12 THE COURT: And what are -- will that opinion
13 encompass any of the terms that are in the definitions?

14 MR. WHITMER-RICH: We do not propose to have that
15 expert offer those sorts of expert testimony, opinion
16 testimony beyond simply saying this is an accurate
17 translation and transcription of this particular clip.

18 MR. HARTMAN: I don't believe -- I don't believe
19 that the transcripts that we gave them included any kind of
20 disagreement about what the meaning to those words were.

21 So I don't think that would be an issue, do you?

22 MR. SOFER: Not to my knowledge. I think this
23 issue -- we've narrowed this down to what we started with,
24 which is the stipulations. I think the only experts that I
25 understand that will be testifying about the terms of the

1 stipulations would be -- again, I think -- and there may be
2 an expert from --

3 MR. DOUGHTEN: If I could, Your Honor. Based on
4 the Court's ruling on Evan Kohlmann, we had an expert we
5 aren't calling, so we've, in essence, let him go. If the
6 Court would, we thought we had the stipulations worked out.

7 THE COURT: So did I.

8 MR. DOUGHTEN: And we're comfortable with what
9 we've worked out, and I believe El-Hindi's team is
10 comfortable with what we've worked out. And we're
11 agreeable to the suggestion that the Government made about
12 possible -- we have no expert because our expert was only
13 going to be Mr. Kohlmann; and if Mr. Kohlmann doesn't come
14 in, we're not calling an expert. If The Court revisits it
15 and allows him to come in, we may have--

16 THE COURT: I will simply say if -- if I give
17 definitions to the jury, they will be deemed instructions.
18 And I will not permit anybody to testify in any way to the
19 contrary.

20 MR. SOFER: And that's the road we thought we
21 were headed down, Judge.

22 THE COURT: That's the road -- we get the
23 definitions to the jury. That's the road we're taking.

24 MR. WHITMER-RICH: We would not expect the
25 experts that we proffer would contradict the substance of

1 the stipulations.

2 THE COURT: I wouldn't admit them to testify that
3 the term Jihad means whatever else -- anything other than
4 what was in the definition or the other terms.

5 MR. WHITMER-RICH: In that case, just for the
6 record, I'm not sure that the Amawi team will be able to
7 agree to some of these --

8 THE COURT: Well, you're headed in the direction
9 of Mr. Kohlmann coming back into the case. We're either
10 going to do that this way or it's going to open up that can
11 of worms. I will do everything I can to limit and
12 constrain it. I'm just letting you know. There's an easy
13 way to do this, a way that, I think, is entirely fair and
14 accommodates everybody's interest in a sense, moves the
15 case along; and -- but you can't have it both ways. You
16 can't say, Judge, you tell them this definition; and by the
17 way, we want somebody to come in and elaborate on that or
18 suggest something different. If nothing else, that leaves
19 the jury totally confused, say, Wait. What's going on.
20 The Judge just says this, and some guy comes in and says
21 that.

22 MR. HARTMAN: There's one problem that I just
23 realized is that Mr. El-Hindi in a couple of places on some
24 of these recordings explains what Jihad means to people.

25 MR. SOFER: Well, that's a different issue.

1 THE COURT: That's a different issue.

2 MR. HARTMAN: Okay.

3 THE COURT: If any -- if there's a recording in
4 which somebody says something means something or
5 understands something, that's different.

6 MR. HARTMAN: Okay.

7 THE COURT: What I'm talking about is
8 Mr. Kohlmann coming in and saying who Zarquawi is or was.

9 MR. HARTMAN: Got it. I understand.

10 MR. SOFER: And Judge, what I was trying --

11 THE COURT: Al-Ansar Islam is or was and what
12 websites are and so forth. Okay?

13 MR. HARTMAN: Yes.

14 THE COURT: So anyway --

15 MR. SOFER: All I was going to say, Judge, is
16 unfortunately, in addition to Mr. Kohlmann, we would have
17 to call other witnesses, because Mr. Kohlmann is not
18 qualified to testify to every single term on that list.
19 So, if the Government is forced into this position of
20 having to litigate the terminology that's set out here,
21 it's not just Mr. Kohlmann.

22 Mr. Kohlmann has a particular focus in his work
23 as Your Honor is aware. If the defense is going to call
24 someone who's going to testify about what Islam is and how
25 Islam affected this case, or is going to testify about

1 geo-political issues related to the Iraq war, then the
2 Government's going to be forced -- I think it would be
3 unfair not to allow us to do that. And we'd like to call
4 those folks in our direct case, which is one of the reasons
5 that we wanted to try to resolve this issue earlier.

6 So, as I understand it, we've worked out sub --
7 contingent on us working out this problem on our own,
8 within our own organizations, we have worked out, I think,
9 a compromise. One that is not perfect, I don't think, for
10 either side; but it does move the case along. It gets the
11 terms to the jury in a way that they can at least have
12 something to reference. And we are happy -- happy would be
13 the wrong word. We are going -- certainly will comply and
14 live with the Court's decision to exclude most of Evan
15 Kohlmann's testimony with respect to all of those terms as
16 well.

17 And so I think all that's left is the fact that
18 we can't be, then, put in a position where, Okay. We've
19 agreed to all that. And then Amawi calling three experts
20 that elaborate, undermine, whatever they do to these same
21 definitions, doesn't make any sense. In that case, I think
22 we are going to be forced to not only call Mr. Kohlmann and
23 ask Your Honor to reconsider your decision on that; but
24 we're going to have to go out, then, and find a slew
25 potentially of other Government experts to testify about

1 these other subject matters which are -- which, A, I think
2 are inappropriately being injected into the case. I've
3 made that record already. But B, we can't sit silent while
4 somebody stands up there and says, Well, you know, the war
5 in Iraq means that because of the war in Iraq and this,
6 that and the polls of the people in the Middle East, these
7 guys must not have been doing what the Government says
8 they're doing. It's unfair to us.

9 MR. WHITMER-RICH: Your Honor, on behalf of the
10 Amawi team, in the very short time that we had to prepare
11 for this case, we sought out and retained who we believed
12 are some of the most qualified experts in the world to
13 testify on these matters. Mr. Altman served in the police
14 administration state department for the year following 911.
15 We did not go find Nomchovski (phonetic) or some person
16 who's going to come in and spin some conspiracy theory
17 about the Iraq war.

18 These are -- both of these experts are relied on
19 extensively by the state department. The state department
20 sends them overseas to talk to overseas audiences about
21 these issues. We are trying to present a defense for
22 Mr. Amawi, and we believe these experts and their testimony
23 are a critical part of that.

24 THE COURT: I understand that. But I have
25 serious reservations about the pertinence of -- relevance

1 of that kind of testimony in this case.

2 MR. WHITMER-RICH: I understand Your Honor's
3 position and we'll try to address it with argument and so
4 forth and we'll live with whatever rulings we get. But in
5 terms of these -- the stipulations and particularly ones
6 that the Government's represented, Mr. Kohlmann is not
7 competent to offer an opinion about -- this just seems,
8 from our perspective, putting the cart before the horse.

9 A stipulation, we're perfectly happy with the
10 stipulations. We -- many -- the identity of many of these
11 individuals, the location of many of these geographical
12 places, they're not controversial; and we're happy not to
13 have someone get up on the stand for no purpose and testify
14 about that. But complicated terms that are widely disputed
15 that we think are very important to the case, it just makes
16 no sense from our perspective to try to stipulate to a
17 meaning when it doesn't seem that we'd be able to reach a
18 meaning.

19 THE COURT: That's fine. I'm not going to compel
20 you to proceed one way or another. Perhaps what I should
21 do is simply anticipate maybe as early as tomorrow night
22 doing whatever it takes to get the final rulings on these
23 issues. I don't know what else I can do. And I'll hear
24 you orally. And I'll review the materials that have been
25 presented to me so far and we'll go from there.

1 I have a serious -- I don't see how the
2 background and history and other data and information about
3 Islam is any more pertinent at all than all the stuff about
4 Al-Quaeda and Chechnya and Bosnia and all that stuff
5 Mr. Kohlmann reported on. The Government disagrees with
6 that; and if you disagree with that, that's fine. But I
7 will rereview reports that we have. And Counsel, you can
8 be prepared tomorrow then to argue those issues before we
9 go home tomorrow night; and everybody will know where we
10 are. In the meantime, I've urged the Government to proceed
11 with its course on the definitions; and we'll go from there
12 with that.

13 I would like -- at the very least, if there are
14 specific definitions as to which -- whatever I understood
15 to be agreement has fallen apart -- have fallen apart, I
16 want to know about that right now, so before we go home
17 today. So, somebody can send me the current list. I will
18 look at it.

19 MR. WHITMER-RICH: I E-mailed Your Honor
20 Mr. Herdman's most recent version, and I will also E-mail.
21 I've been trying to review these with my client, and I will
22 E-mail you before the end of today and Mr. Herdman the
23 outstanding objections at least the specific numbers that
24 the Amawi team has and the balance that can be acceptable.

25 THE COURT: I'd like to look at those before we

1 go home today, if possible.

2 MR. WHITMER-RICH: We can probably.

3 THE COURT: If you're able -- if I give you some
4 time to do so.

5 MR. WHITMER-RICH: I would imagine we can do
6 that, Your Honor.

7 THE COURT: You sent me both a PDF and a Word
8 document. Are they the same?

9 MR. WHITMER-RICH: They are the same. I believe
10 that Mr. Herdman's documents -- yeah, I believe they are
11 the same document. And I think they contain the same list
12 in three different forms; is that right, Mr. Herdman? The
13 list that you sent to me that the Judge -- would have them
14 list by topic and the second list them in alphabetical
15 order.

16 MR. HERDMAN: That's correct.

17 MR. WHITMER-RICH: So it's two sets of the same.
18 They're both contained in each document. Each document is
19 the same.

20 THE COURT: Okay. And I will forward what you
21 just sent to me to everybody else, I hope.

22 MR. WHITMER-RICH: They should all be in
23 possession from last night, but that's fine.

24 THE COURT: Yeah. If somebody can be at least in
25 terms of those as to which the disagreement, I want to get

1 that sorted out before we go home tonight. Okay?

2 Okay. Where are you with production of both
3 transcripts to the extent that they are varied from the
4 Government's and the designation of portions that you are
5 going to be using?

6 MR. HARTMAN: We have sent as of 11:40 today, I
7 believe, 35 different excerpts to the Government that we
8 intend to be using. I'm creating a table that so far there
9 are about 22 or 25 on the table that the table kind of
10 matches what the Government gave to us, just as a reference
11 to the page numbers that the excerpts come from and
12 whatnot. The excerpts are also highlighted in the
13 transcripts.

14 We've been sending the Government all the
15 transcripts that we get, so some of them went there with no
16 highlighting, which frankly confused things for the
17 Government, because we weren't using those excerpts. But
18 we got these transcripts, so we passed them on. That's
19 part of the problem.

20 We are -- with the exception, I think, of a
21 couple of videos, all of the what I will call vital
22 recordings have been sent over and have been included in
23 the list and sent to the Government. We still have a few
24 to review, because we still, quite frankly, are getting a
25 couple of transcripts back. Wherever possible we are using

1 the Government's transcripts rather than our -- even if we
2 don't -- you know, we're not even comparing to say that
3 ours are more accurate, theirs are less accurate. We're
4 just using theirs. You know, we're trying to pare this
5 down, so we don't play entire recordings.

6 THE COURT: Do you presently have your versions
7 that you plan to use -- not plan, but expect to use where
8 there are variances between your versions and the
9 Government's versions?

10 MR. HARTMAN: In a couple of cases, yes.

11 THE COURT: Well then, I'm going to hold an
12 audibility hearing today on those. I don't know what else
13 to do. I hoped to get all this stuff cleared up today, so
14 we can move along tomorrow. If to the extent that there
15 are varying versions, I'm going to do what I did yesterday
16 afternoon.

17 And I thought more about this by the way. It
18 seems to me that in reviewing a -- a transcript for
19 accuracy, I shouldn't do -- if anything -- if anything, I
20 shouldn't do much more than what the jury -- the jury's
21 going to be exposed to this once, rather than as you all
22 have been, time and time and time and time again and as I
23 did a bit yesterday. If I don't hear it when it's
24 displayed, where there's no disagreement, that's fine; but
25 if there are two variances, inaudible and a word is

1 believed to have been spoken, or if there is disagreement
2 as to whether a record was spoken and it's truly an
3 inaudible or some other word, I think, candidly, the proper
4 approach is for me -- most proper approach is for me to
5 listen to it the way the jury will, because I have to put
6 myself in the shoes -- or in the earphones of the jurors.
7 And if it can't be heard on an ordinary playing or
8 transmission, it shouldn't be in the transcript.

9 MR. HARTMAN: Can I have a moment?

10 THE COURT: Sure. That's all I'm saying.

11 MR. HARTMAN: I understand.

12 THE COURT: This occurred to me this morning as I
13 was coming down here today; and candidly, I don't know --
14 excuse me. I don't know of any case where a judge has
15 taken this approach, but it sure makes sense to me.

16 MR. HARTMAN: Did you say it shouldn't be heard
17 or it shouldn't be read, the transcript?

18 THE COURT: No. No. If -- yesterday the whole
19 problem about press and out or whatever we were talking
20 about, you know, it took several replayings before I
21 thought I heard it; and by the time we got to the end, I
22 didn't hear it. Okay. And we probably replayed that 25
23 times. Well, we don't do that in front of a jury. The
24 jury hears what it hears. That's the evidence. It sees
25 what it sees as an aide to understanding, to help us make

1 its hearing more key as it were. But as that's occurring,
2 there's a disagreement, one of you says, It means A and the
3 other -- or the word was A. The other one says, No. It
4 was B. If there's that disagreement, I don't think I
5 should absolving this agreement as I understand I'm
6 supposed to under the Sixth Circuit law. I don't think I
7 should sit here and replay something 25 times or replay it
8 until a point where I say, Yeah, you're right.

9 So -- and what I would propose is to the extent
10 that -- as you sit here now, you have presented the
11 Government with transcripts -- not translations, I'm
12 talking transcripts -- of conversation conducted in English
13 that has differing contents of the same conversations that
14 the Government already has transcripts of. And I would
15 propose that if that stuff is at hand, let me get about the
16 business of listening to it.

17 The whole point of what I've tried to say for the
18 last 10 minutes now -- or five minutes is that course of
19 listening I don't think should involve multiple, multiple
20 replays. I think I put myself in the jury box; and if I
21 can hear it, I can hear it. If I can't hear it, I can't
22 hear it. Or if I hear something different, I hear
23 something different. That's what I understand I'm supposed
24 to do.

25 MR. BRYAN: Your Honor, if I may just very

1 quickly, I would -- based on that standard, I would
2 suggest, then, a lot of what the Government played during
3 direct examination of Mr. Griffin would not have passed
4 that standard. In fact, their own witness testified that
5 he had to listen to the tape multiple times to prepare the
6 transcript.

7 THE COURT: There was no objection to the
8 accuracy of the transcripts. So, I was not about to sit
9 down and go home every night and listen to two hours worth
10 of recordings to confirm that I could, in fact, hear the
11 what the transcript said. And I think the law is quite
12 clear. I'm not presented with an objection to accuracy. I
13 sit back and listen along with everybody else.

14 MR. BRYAN: I agree, Your Honor. I'm not
15 disputing the accuracy with what the Government proposed.
16 I would just say that listening to it the first time, you
17 don't always hear everything that's there. I, myself, went
18 through the transcript several times and listened to the
19 tapes at the same time and was able to pick up on it
20 eventually.

21 So, that's what I'm suggesting. In our effort to
22 try to get some of this information before the jury, if
23 there is a consensus after listening to it -- I'm not
24 saying 20 times, but three or four times. If Your Honor
25 can hear it and notice it in the transcript, I think that

1 would be more appropriate than just giving it the one shot.

2 THE COURT: I'll -- it can vary. I will see. It
3 can vary. I mean, sometimes you can't hear anything.
4 Okay. It's this and not that. And some, Okay. Let's
5 replay, and I think I heard it.

6 MR. SOFER: Your Honor, I think Your Honor put
7 your finger on the -- there was no objection to the
8 Government's -- the accuracy of the Government's
9 transcripts and tapes that we put in.

10 Here's our problem with the El-Hindi transcripts
11 and audio. What we have been supplied with, all due
12 respect to counsel, for Mr. El-Hindi was just a mess. We
13 could not -- we were getting multiple copies of the same
14 thing.

15 THE COURT: Let me also say that I will note the
16 objection of counsel for Masloun. We've -- we'll get to
17 hear Mr. Amawi and Mr. Masloun's cross-examination and give
18 ourselves some breathing room.

19 MR. SOFER: That's what I was going to suggest,
20 Your Honor.

21 THE COURT: You've won.

22 MR. SOFER: Sorry, Judge.

23 THE COURT: Remember, rule one. What's rule two?
24 Don't interrupt me. Rule one's don't interrupt. Rule two
25 is if you won, sit down.

1 MR. BRYAN: Your Honor, also, the thing -- I have
2 to object specifically to some of the things in the
3 Government's trial transcript is based upon certain
4 reassurances made to us that once we want to present this
5 evidence that if we believe that it says something else, we
6 will be given the opportunity to present that.

7 THE COURT: Sure, and you will.

8 MR. BRYAN: And one specific example in
9 Mr. Amawi's case, they were watching the beheading --
10 the -- the --

11 THE COURT: I couldn't hear you.

12 MR. BRYAN: One specific instance in the
13 Government's transcript where I don't think it was a
14 mistranscription, I think it was something that they listed
15 as inaudible that to me was clearly audible when I heard it
16 the first time. It said unintelligible; and Mr. Amawi
17 responds to the -- Mr. Amawi said, unintelligible cutting
18 up heads. The unintelligent word to me clearly was don't.
19 I don't want to see cutting of heads, which clearly changes
20 the meaning.

21 THE COURT: Rather substantial, I agree.

22 MR. BRYAN: I think we should be permitted to
23 point that out.

24 THE COURT: And if you're going to be offering
25 that, by all means.

1 MR. SOFER: Two things about that, Judge. We
2 have gotten from the Amawi team this alternate
3 transcription.

4 THE COURT: I understand.

5 MR. SOFER: And certainly, again --

6 THE COURT: If -- if it's not in your hands now,
7 they're not going to get to play it tomorrow or the next
8 day. If they want to come back and offer it in this case
9 in chief and give you time and me time to make an
10 audibility determination, we will. It's not the end of the
11 case. We all know that come this weekend, okay, they still
12 have the opportunity to -- talking about cross-examination.

13 MR. SOFER: Understood, Judge.

14 THE COURT: In that instance, Mr. Bryan, it's not
15 Mr. Griffin's interpretation; it's the Government's. And
16 so I wouldn't see an appropriate and necessarily desirable
17 topic for cross-examination.

18 Mr. Boss?

19 MR. BOSS: Judge, I'm just going to observe that
20 the transcript segments that we have decided to use for
21 most all of the transcripts are, indeed, the ones the
22 Government sent us in their most recent version. Where
23 there may be some issues is because the Government
24 clarified and certified and made certain that what they
25 played for the most part was accurate; and they shared with

1 us that things outside of the highlighted text that they
2 call their segments or clips, they were not certifying the
3 accuracy of them. If there is a deviation from, you know,
4 what is heard, likely because the government hadn't had the
5 chance yet to go back and clarify those.

6 We found -- today I was working on a particular
7 clip from the dinner video; and a portion that was played
8 by the Government where I found what I thought to be a
9 deviation from what was actually there, I've had my staff
10 make the change in the Government transcript that we are
11 still using. But we are sending along with that an alert
12 to the Government that that's where it's exchanged.

13 And so what we're endeavoring to do is where we
14 find a change to make what the Government provided us,
15 we'll give them a heads-up and everyone else when we send
16 it along.

17 We're really trying to get this done, and we
18 don't intend to -- that one that I'm referring to is
19 probably the most important one, the February 16th video;
20 and I'm through perhaps a third of it. And so we're trying
21 to get this done. But most of the -- we're 80 percent
22 done, I think.

23 MR. HARTMAN: Yeah.

24 THE COURT: Done sending transcripts, or done
25 sending transcripts and specific designations?

1 MR. BOSS: Transcripts and specific designations.

2 What we're hoping -- or intending to do next is
3 go through and weed it out so that we're not playing more
4 than what's necessary; and we're not, you know, otherwise,
5 burdening the Court, the jury, the government and any of
6 the rest of us.

7 MR. SOFER: Judge, again, our problem is the
8 timing of this. I don't know when this is going to end,
9 but I've thrown my hands up on this issue. We -- the Amawi
10 team got us a list of their excerpts. We looked at them.
11 We analyzed them. We came back. We worked it all out.
12 I'm told by a number of people that --

13 THE COURT: Well, I'll tell you what we're going
14 to do. To the extent that these aren't resolved by the
15 close of business on Friday, we're coming back here
16 Saturday morning and I'm going to hold my audibility
17 hearings and I'm going to decide. And as soon as counsel's
18 preference to postpone consideration of the expert
19 testimony, I will do that Saturday and then Sunday, if
20 necessary. That's the way it's going to be. If you want
21 your experts here to testify, bring them in for whatever
22 day I say.

23 Mr. Sofer's absolutely correct. It's crucial
24 that these decisions be made. I'm not going to go into the
25 whys and wherefores of the delay, because I don't think

1 anybody in this case has acted in any way other than with
2 absolute good faith and making every effort to meet that
3 and being professional and cooperate with each other. If I
4 felt differently I'd be a lot more upset about things; but
5 I don't. You know, I'm not dealing with a bunch of people
6 who are throwing a lot of elbows under the backboards and
7 calling every -- everyone at fault. Whether it's in or
8 out, that's what I'm going to do. I don't know what else I
9 can do, because they have to get this stuff.

10 I want this stuff to them by the close of
11 business tomorrow, every designation. If you don't have it
12 designated in a transcript by 4:00 tomorrow afternoon,
13 you're not going to get to use it on cross-examination. I
14 don't know what else to say, because you need to have --
15 they need -- just as you do, the Government needs time to
16 be prepared.

17 MR. HARTMAN: Judge, I have no problem with that.
18 I think it's completely fair. I would just want to remind
19 the Court and have on the record, we got no less than four
20 different versions of transcripts from the Government --

21 THE COURT: I understand all that. And it's
22 all -- I know the problems in getting the transcripts from
23 the Government. We are all dealing with a --
24 circumstances, Mr. Griffin's testimony was probably
25 two-thirds of what you expected. Is that a fair guess?

1 MR. SOFER: I didn't hear.

2 THE COURT: Took about two-thirds as long or
3 three-quarters as long as expected, so people thought,
4 Well, gee. And we've taken a week already, and I'm not
5 going to take anymore time from. If it means working on --
6 this weekend, because I'm not available next week, we're
7 going to tend to this event.

8 Angela, if it's necessary to get contract
9 reporters, we'll get contract reporters; and you will not
10 have to pay for them. I will take care of that.

11 MR. BOSS: Your Honor, while I respect the
12 Court's position, 4:00 tomorrow, and as it's meaningful to
13 me, we have court tomorrow; and we'll be in court all day.
14 It is -- the courses of the transcripts that have yet to be
15 reviewed by us will not be used in the additional
16 examination of Mr. Griffin. They will not be used until,
17 you know, the following week. It's my hope that we can --

18 THE COURT: No. But my point simply is I have no
19 other time to conduct a meaningful audibility review so
20 that everybody knows as soon as possible, even though much
21 of Mr. Griffin's cross-examination will be done, what's in
22 and what's out. That's all I'm trying to accomplish.

23 MR. BOSS: Yes, sir.

24 THE COURT: Because, you know, I had hoped
25 yesterday and today to rule on a bunch of hearsay issues;

1 but we couldn't. This is a classic chicken and egg thing.
2 Until we have -- until everybody knows what the -- version
3 of a transcript is that the jury will see, you can't
4 formulate your cross-examination.

5 A class -- A example is the one yesterday. It's
6 obviously a very important snippet of a conversation of
7 transcript that's not coming in. The conversation is -- I
8 couldn't hear it, so they have to adjust their
9 cross-examination accordingly and so do you and so -- and
10 the government as well. So -- and I don't know when else
11 we can do it given the delays that have been encountered.
12 Get it done by noon on Friday. Okay. That's all I'm
13 saying. Give them time to look at it and give each of you
14 time to talk to them. That's all I'm saying.

15 Look what happened with Mr. Ivy yesterday. It
16 evaporated, because you took 15 minutes in talking to him.

17 MR. SOFER: And again, Judge, are you saying noon
18 on Friday or 4:00 tomorrow?

19 THE COURT: I'm going to -- Mr. Boss, when can
20 you -- what deadline can you impose upon yourself?

21 MR. BOSS: Noon on Friday would be perfect,
22 Judge. Thank you. We'll be able to, then, have all night
23 tonight and all night tomorrow night after court -- 8:00
24 a.m. Friday, because we'll be coming back to court.

25 MR. SOFER: And Judge, here's my problem with

1 this. I've raised it before --

2 THE COURT: Well, we're adjourning court about
3 1:45 on Friday afternoon.

4 MR. SOFER: -- and what I said starting about two
5 months ago, Your Honor, was we -- it takes us to give them
6 this kind of time and then expect the Government to turn
7 around and in a half a day or day is just -- it's not fair.

8 THE COURT: Well, the point still -- the point
9 isn't as important to the Government as its ability to
10 respond is. What really matters is my listening and making
11 my mind up.

12 MR. SOFER: But that would, then, require Your
13 Honor, which I don't think you wanted to do, to sit here
14 with us while we all try to figure out what --

15 THE COURT: That's what I'm going to do starting
16 at 8:30, 9:00 Saturday morning. We will do that as long as
17 it takes Saturday and Sunday, if necessary.

18 MR. BOSS: Much to my surprise, it may not be
19 that big of a deal, because I don't think that we're
20 providing any deviant versions of transcripts, except a
21 sentence or two. We are adopting the Government's version
22 of the transcripts.

23 MR. SOFER: I've been told otherwise by the
24 people who are reviewing what we've been getting. That's
25 all I can say.

1 THE COURT: Focus on how far of -- the
2 designations -- what percentage of the -- that's what
3 counts is the designations, what percentage of those by
4 designation, I mean, things that you may use or
5 contemplating possibly using on cross-examination,
6 realizing you may not use all of them.

7 MR. HARTMAN: Have we turned over?

8 THE COURT: Right.

9 MR. HARTMAN: 90 percent, I think. And if the
10 Government wants to tell us --

11 THE COURT: Before you leave today, sit down and
12 make sure they understand how you've communicated that, so
13 at least say, No. Oh, that's what you mean. Okay?

14 MR. HARTMAN: And I'm certainly willing to.

15 THE COURT: And if you can't -- whatever isn't
16 worked out by when we adjourn on Friday, we will resume on
17 Saturday. And I will listen to whatever I have to listen
18 to for as long as I have to listen to it. But I do not
19 contemplate listening to -- replaying each snippet 22 dozen
20 times. I would -- I'm not going to do that. Some I may
21 three or four, let's give it a try again. Some I may say,
22 No, I can't hear a thing. Some I might say, You're wrong.
23 That's how I understand I'm supposed to do it in the
24 Sixth Circuit.

25 MR. HARTMAN: I think that's fine, Judge.

1 THE COURT: And likewise, I will -- I don't think
2 I -- unless you want to try and do it one evening, I'm not
3 real keen on that. I think we better expect to spend
4 Saturday on the -- and Sunday, if necessary, on being heard
5 about the experts.

6 Each of your experts to the extent that there are
7 objections to the subject matters about which testimony is
8 being offered, certainly with regard to how that interlocks
9 with the Government's case in chief, and because, also, I
10 think the Government's request is entirely fair. Look,
11 Judge, you really can't tell us whether your decision as to
12 Kohlmann is the last word until you've told us about this
13 other stuff.

14 MR. WHITMER-RICH: I am moving to a new house
15 this weekend, on Saturday, so I will unfortunately not be
16 here on Saturday; but we will do -- we will do whatever we
17 can. We'll find able colleagues. I'm sorry, Your Honor.

18 THE COURT: Normally, I'd say fine; but I can't.
19 It's too late.

20 MR. WHITMER-RICH: I understand.

21 THE COURT: Okay.

22 MR. HARTMAN: Judge, can I have one second?

23 MR. SOFER: Judge, here's -- Counsel just asked
24 me a question, and I think it's important for Your Honor to
25 rule on this. If we're going to be talking about the

1 experts, there are obviously different levels of inquiry.
2 There's a Daubert hearing. There's the question of their
3 just general relevance. Counsel asked whether the
4 Government has formally objected to the linguist, for
5 instance, by linguist the ships, trains passing in the
6 night.

7 THE COURT: Georgetown?

8 MR. SOFER: Yeah, from Georgetown. And
9 absolutely, we formally object to his testimony.
10 Absolutely, we formally object to the testimony of the
11 Amawi witnesses other than the translators, slash,
12 linguists; and I understand that pending Your Honor's
13 decision at least for Mr. Masloun, we would object to the
14 witness proffered as an expert by Mr. Masloun as well to
15 the extent that that -- that any of our discussion reopen.

16 I just want to remind the Court again that the
17 Government will -- we've already begun to do this, but we
18 will now do this in earnest. We will now seek to identify
19 new experts who can fill in the gaps should the Court, not
20 knowing what Your Honor will do, should --

21 THE COURT: I don't either.

22 MR. SOFER: -- should the Court allow some of
23 this testimony. Again, we're going to go out and find a
24 person who can hopefully rebut the testimony of the issue
25 of the ships passing in the night, and whether Islam

1 somehow forgives the behavior and violation of U.S. law,
2 et cetera, et cetera. Again, we have no choice but to do
3 that on a very short time line.

4 THE COURT: I understand that. That's why I want
5 to get this resolved before we -- I want to get this
6 resolved by this weekend at the latest.

7 MR. SOFER: I hope Your Honor will accept our
8 oral objection as opposed to a written motion given the
9 time frame.

10 THE COURT: I will.

11 If you have an opportunity to provide, however
12 brief, a summary or bullet point, that's fine too.
13 Whatever is going to facilitate our time together this
14 weekend.

15 MR. HARTMAN: I'm going to have a bit of a tough
16 time orally arguing without the final report. I understand
17 Mr. Sofer has the objection to some of the conclusions that
18 are drawn, which I'm frankly saying, Fine, we'll take out.
19 But there's other testimony that I don't believe is --
20 is -- is as objectionable; and without final report, I
21 think we might have a tough time deciding that one. I'll
22 argue it, but just don't know that we're going to be ready.

23 MR. BRYAN: Your Honor, the suggestion and red --
24 just to -- to dispel the suggestion and the red herring
25 that was just thrown out by Mr. Sofer, I don't think you

1 can even glean this from reading the reports of either --
2 the one expert or Jonathan Alterman.

3 Nowhere is there going to be an expert that's
4 called that says that Islam forgives the violation of
5 federal law. And I think that if he tries to make a
6 caricature of what our experts are saying -- and he
7 sometimes, I think, can win with the Court -- what they
8 will testify to, quite frankly, I'm not even sure it can be
9 disputed; but then anyone can dispute it. And I welcome to
10 see whatever the Government --

11 THE COURT: It may be as --

12 MR. BRYAN: These basic simple principles,
13 Your Honor.

14 THE COURT: It may be as accurate to the
15 proposition, the sun rises in the east and sets in the
16 west; but that doesn't mean that the circuit of the sun has
17 anything to do with the issues in this case. And the issue
18 is a question of relevance, at least as I understand the
19 basis for the objection.

20 MR. BRYAN: We're prepared to argue relevance.

21 THE COURT: And that's my understanding.

22 MR. SOFER: Absolutely, Judge. It's a -- it's a
23 down-the-line question of relevance for all -- in the case
24 of I think his name is Dr. Shy. I apologize if I'm
25 butchering his name. It's a question of the validity of

1 any of his testimony. And again, this has been litigated,
2 I believe, in a number of courts; and we'll be prepared as
3 best we can to orally argue this. But again, the problem
4 we have here, these are relatively complex issues. It's
5 just -- it's a question of timing. Again, we're doing this
6 in the middle of the Government's case.

7 THE COURT: If you can suggest something better
8 than attempting to do this, this Saturday morning, let me
9 know.

10 MR. SOFER: No. I think unfortunately that's
11 exactly what we have to do.

12 THE COURT: As I said, I would like -- there's
13 one other thing I didn't mention -- are there other things
14 anyone else wants to mention? But I do want to have an
15 audibility hearing or maybe take a recess and have you
16 people look at what you have and talk to each other.

17 I do want to look at the definitions yet this
18 afternoon or this evening. I should -- I want to tell the
19 defendants that the Government has given to me for
20 in camera review or made available for in camera review the
21 receipts that we talked about, payment receipts may be --
22 the records of various payments to Mr. Griffin. And my
23 question to you is: What do you want me to do with them?
24 They're quite voluminous. I did ask Mr. Sofer, and this is
25 the extent of my inquiry on this. I think I did ask him

1 what they wanted me to do, because I was kind of -- I
2 couldn't recall why that stuff was coming in, short
3 attention span. He reminded me that this is in response to
4 that request and order by me and I think the proper
5 question is not what they want me to do, but what you want
6 me to do with it in anticipation of cross-examination.

7 Also, I understand it. I've not looked at it,
8 but the -- the records are in chronological sequence rather
9 than topical sequence. In other words, there's not a
10 collection of phone bills. There's not a collection of
11 meal receipts. There's not a collection of got to go out
12 and buy videotapes or whatever. It's just sequentially and
13 it would be hugely helpful to me as I review what I want
14 you -- you want me to do. Because a Jencks, slash, Brady
15 kind of way when -- if you ask specific questions about
16 specific topics, I can verify the receipt that the answer
17 conforms to the record.

18 MR. BOSS: It was a bit of that and more.

19 THE COURT: I mean, because quite candidly, you
20 know, how many years does this cover? And there's a stack
21 of stuff.

22 MR. BOSS: What we understand --

23 THE COURT: And these are -- by the way, only the
24 payments -- only payments, I think, are material are from
25 the FBI.

1 MR. BOSS: My principal concern did not have to
2 do with the payments that were made to him precisely or
3 exactly for his salary. Although if there are signed
4 receipts and they reflect that he's acknowledging tax
5 purposes, that would be, of course, important. But in the
6 direct examination of Mr. Griffin, there was an exchange
7 where Mr. Griffin acknowledged that he had received
8 reimbursement for -- from the Government for \$45,000 of
9 satellite phone bills. He, then, went on to explain that
10 he still owed about 20 of that. In other words, money that
11 was paid for him.

12 THE COURT: I think it was 22, but that's okay.

13 MR. BOSS: Pardon me. Money that was paid to him
14 extensively to reimburse some other expense was stuck into
15 his pocket and only later -- very recently discovered by
16 the Government which leads us to the conclusion that this
17 may not and probably was not the only time that that
18 happened.

19 And so we are interested in that category of
20 receipts that does not uniquely come to what we've been
21 provided already in terms of his income in Jencks and
22 because we now know he has been known to --

23 MR. HARTMAN: Not only that, Judge, the
24 Government -- who's responsible for that \$22,000? He said,
25 I am, making it sound like he's the one that had to pay for

1 that.

2 MR. BOSS: We believe that that segment of the
3 testimony causes the entirety of those receipts to now be
4 discoverable. Because as the Government, I believe,
5 acknowledged, they didn't discover this until only
6 recently. Had they known about it, of course, we would
7 have been given notice earlier.

8 The point is they didn't know about it because of
9 the deception of the witness. And so -- and frankly, we
10 believe that in the fact pattern, we have a couple -- in
11 fact, several other instances specifically where he was
12 paid money to be reimbursed as a specific expense where we
13 know that it was paid by someone else instead.

14 THE COURT: Well, to that extent, may I suggest
15 this, you go ahead and question him. Let me hear what the
16 questions are.

17 I was really asking if there are specific items
18 you want me to be prepared to make a determination on
19 instantaneously, but perhaps what we should do is wait and
20 see what -- see what the answers are.

21 MR. BOSS: Okay. We'll try --

22 THE COURT: This really becomes at all -- an
23 issue if there's a variance between an answer and the
24 record, as he did say here, 22,000 is still owed. You can
25 obviously cross-examine him about the misleading

1 impression. Well, you got paid for that, didn't you? Yes.
2 And move on down the road. The record will confirm that,
3 and that would be admissible. Simply, hearsay statement is
4 not inconsistent.

5 MR. BOSS: We'll try to identify those specific
6 instances in the record.

7 THE COURT: That's all I'm asking. I don't want
8 to sit down and review a stack of 3 or 4 inches high of
9 random paper. Like Mr. Sofer's saying, you tell me what
10 you want me to look at rather than the whole stack. That's
11 fine.

12 Okay. Shall we -- are you in a position -- or
13 would you like me to take a short break to enable you to
14 figure out between yourselves by looking at the list of
15 stipulations, definitions where you're squabbling; and I
16 can come back and see if we can't resolve that,
17 Mr. Doughten?

18 MR. DOUGHTEN: I just want to be sure I'm clear.

19 THE COURT: I can't hear you.

20 MR. DOUGHTEN: I want to be clear, we've been
21 moved second in the pecking order for cross-examination.

22 THE COURT: Yes.

23 MR. DOUGHTEN: We have one request; and that is,
24 if Amawi cross is done before the end of the day on
25 Wednesday, if we can have until Thursday morning? The

1 reason for this, Judge, is we --

2 THE COURT: If they get done before normal
3 closing time tomorrow?

4 MR. DOUGHTEN: Yes.

5 THE COURT: I don't think that is really an
6 issue, Mr. Ivy. It's more like I expect to carry-over
7 until Thursday.

8 MR. IVEY: No. My whole -- Your Honor, my hope
9 is to be done tomorrow. I just gave myself the extra
10 cushion, so I didn't get impeached by the --

11 THE COURT: Ladies and gentlemen, he promised me
12 I'd be home by 4:30 this afternoon. Mr. Ivy, you may
13 continue tomorrow morning at 8:00. Come a little early
14 folks, because Mr. Ivy fibbed to us.

15 Is that okay, Mr. Ivy?

16 MR. IVEY: Yes.

17 THE COURT: No. That's fine. Whenever he gets
18 done, we'll break tomorrow.

19 MR. DOUGHTEN: The other issue we have -- and
20 this is just so the Court's aware -- we're all sharing the
21 technician to match up the tapes with the -- I guess, the
22 translations. We don't have access to that, because I
23 won't mention the party; but they're using up most of the
24 time. We may have to actually use transcripts that are
25 limited.

1 THE COURT: That's fine. And --

2 MR. DOUGHTEN: They're what the Government gave
3 us.

4 THE COURT: I'm -- I'm sure more ordinary
5 transcripts would have been more reasonable across the
6 board anyway. You're welcome to do that. You can use the
7 late 20th century technology.

8 MR. DOUGHTEN: I'm doing the cross, and I'm more
9 comfortable -- if Mr. Helmick were here, he'd have to use
10 the --

11 MR. SOFER: Your Honor, that point reminds me
12 that when we discussed sort of the logistics of confronting
13 the witness --

14 THE COURT: Excuse me. I apologize. I've got a
15 message I have to look at.

16 Go ahead. I'm sorry.

17 MR. SOFER: The logistics of confronting the
18 witness with what could be a prior inconsistent statement,
19 which I think we're talking about here on
20 cross-examination. We had talked yesterday about whether
21 or not the witness will be shown a transcript versus played
22 the segment; and I think Your Honor asked -- I just don't
23 know the answer to this which is why I bring it up, so we
24 don't end up having to do this tomorrow morning -- is
25 whether or not the defense would prefer to confront the

1 witness with the actual recording as opposed to a written
2 transcript, whether or not we can work out a system whereby
3 because he has earphones somehow the witness can hear that
4 and the jury does not, because I don't think that's an
5 appropriate way to confront him.

6 THE COURT: Hold on a minute, please.

7 (A brief discussion was had off the record.)

8 THE COURT: I hope he will know the answer to
9 that question. I would suggest, though, if we don't get a
10 clearance at the very least by way of back up, you probably
11 should be prepared to present Mr. Griffin with the
12 transcripts. Candidly, I think that's probably the safer
13 thing to do even if you, then, replay the conversation.

14 Just seems to me that that -- that Mr. Griffin,
15 do you recall this conversation? The conversation the
16 other day was played for the jury. Will you please look at
17 this printed transcript version that comes with page 68,
18 line three? Read it to yourself. Seems to me, it will be
19 a lot easier.

20 MR. SOFER: I agree, Judge.

21 MR. BRYAN: Your Honor, if I may, I was not
22 present during yesterday afternoon's session.
23 Unfortunately, I had another responsibility in Akron, Ohio.
24 But I'm a little bit perplexed, and my colleagues tried to
25 explain to me what was decided yesterday. But as it

1 relates to the playing of transcript excerpts -- not just
2 transcript excerpts, but the actual audiotape excerpts of
3 Mr. Griffin, I was advised that it's the Court's position
4 that we can't just play excerpts that Mr. Griffin was
5 involved in, say, conversation with Mr. Amawi during the
6 same time frame that the Government's excerpts were used;
7 in other words, before or after.

8 THE COURT: No. If it's offered to general -- I
9 think my view would be somewhat flexible or liberal view of
10 completeness to set context, to avoid misunderstanding. To
11 clarify something, then that's fine. But the point that we
12 spent a lot of time talking about yesterday -- and I hope
13 to rule on instance by instance yesterday or today, but
14 haven't been able to do so and won't be able to do so
15 probably -- would be where you undertake to introduce
16 conversations or recordings that could properly belong in
17 your case in chief. There's a difference between
18 cross-examination and introduction of matters that even
19 though they may have been covered on direct examination
20 will be viewed as your case in chief. More than that, I
21 can't say.

22 I had hoped to go through -- I thought we would
23 be spending yesterday and today going through conversation
24 by conversation. We can't do that to some extent because
25 we don't know what the conversations are. We don't know

1 what -- Mr. Ivy, I think, will probably say, Judge, look, I
2 don't want to get too far into this, because I don't want
3 to disclose what it is I'm going to be asking. Again, it's
4 the chicken and egg.

5 I don't know what the purpose of the
6 particular -- what the predicate questions have been
7 leading up to now that have played, excerpt, whatever it
8 is. I don't know whether the Government's going to object
9 to that or not, and I don't know what the objection is. I
10 haven't heard from you in terms of what the purpose is.
11 And I think if I can understand this and I would agree and
12 probably taken the same approach, Hey, for me to tell all
13 that to you two days before my cross-examination, my little
14 kittens are out of the bag and running all over the
15 courtroom; and I'm worried about that. I don't think
16 that's a desirable situation to be in.

17 MR. BRYAN: So, just to be clear --

18 THE COURT: I cannot be clear -- I'm sorry --
19 until I see what the question -- until I hear what the
20 questions have been, I hear an objection from the
21 Government. I can't make anymore -- I'm as frustrated by
22 that as you are. But that's the way it is. I can't be
23 more clear.

24 MR. BRYAN: I understand that.

25 THE COURT: I'm going to follow the applicable

1 rules of evidence as I understand them.

2 MR. BRYAN: And just --

3 THE COURT: That's what I'm trying to be clear
4 about.

5 MR. BRYAN: I understand that, Your Honor. But
6 as it relates to the type of excerpts that I think could be
7 played during cross-examination -- and again, I'm not --
8 I'm just doing this for my own clarification in my own
9 mind. The first type, it's the type that I first alluded
10 to which is an excerpt that goes beyond the excerpt that
11 the Government played, just to try to put it --

12 THE COURT: If it's within -- if it's within, my
13 instinct will be my own personal somewhat liberal view of
14 rule of completeness, yes. If it's not, no, unless it's
15 properly offered for some purpose during cross-examination
16 rather than being offered prematurely, because it's clearly
17 admissible or can be admissible; but it is presentation of
18 the defense theory.

19 And for example, I suppose to the extent that it
20 is or may become involved into a defense theory of
21 entrapment or governmental provocation, it seems to me that
22 that probably is something that ought to be held in
23 abeyance until it's your case. The Government puts on its
24 case; and it's your turn to say, Wait, folks, you've heard
25 what they did. You've heard what they said. But let's

1 tell you why all that happened is because of the -- I mean,
2 power tuning and provocation that was going on; and here it
3 is. I don't think that that's a proper subject of
4 cross-examination.

5 MR. BRYAN: So, that, then, is the second type of
6 excerpt that --

7 THE COURT: I don't know. I can only tell you
8 proceed as you desire to proceed rather than feeling
9 foreclosed as I'm -- because I'm trying to respond to your
10 questions as best I can and answer in the abstract.

11 MR. BRYAN: As Your Honor mentioned, you
12 mentioned -- and again, this is just for argument purposes.
13 There's evidence that we can use this sort of to develop an
14 entrapment defense. Again, that's not suggesting that
15 we're going to do that; but if there's evidence there of
16 inducement in some of these other tapes that the Government
17 did play, our ability to present that evidence in
18 cross-examination of the main witness who was inducing,
19 Your Honor, is suggesting that we may -- that we would have
20 to wait until later.

21 THE COURT: I don't know. It depends. Okay. If
22 he -- let's say he says, Yeah, part of what I was about was
23 trying to get these people to go along with what I was
24 proposing. Well, what's the need to go cross-examine? He
25 will admit exactly what it is you're trying to establish.

1 MR. BRYAN: And it's under those circumstances,
2 if he denies it, then we may be permitted to cross-examine
3 on it.

4 THE COURT: I don't know. I'm trying to grasp --
5 I mean, the more I talk, the more I'm setting myself up for
6 being told by the Court of Appeals, You shouldn't have
7 misled them. Okay. And I'm sorry. That's why I don't
8 want to go there, because I don't know what the specific
9 clip is, what its content is. I don't know what the
10 questions are that have been asked of the witness on
11 cross-examination and their propriety; and I don't know in
12 the face of what objection might be made, and what then
13 your answer would be.

14 And I don't want you standing up if you lose this
15 case a year from now and say, Well, the Judge told us this,
16 because you already suggested that at the start of this
17 colloquy, The Judge told us this; and you know, if he
18 hadn't told us this, we would have done that. You know, I
19 cannot give you anymore clearer -- I will do within the
20 limits of my human understanding and my human ability the
21 best job I can to follow the rules of evidence as I
22 understand they should be followed.

23 MR. BRYAN: That's understood, Your Honor. So,
24 just prepare our cross and proceed as we normally would and
25 wait for objections to be made.

1 THE COURT: That's right.

2 MR. BRYAN: Thank you, Your Honor.

3 THE COURT: And I'll rule on the objections.

4 MR. SOFER: Just, Judge --

5 THE COURT: One question, one objection, one
6 ruling and maybe one answer at a time.

7 MR. SOFER: One issue, though, I think, Counsel
8 appropriately just raised is, you know, again, for us to --
9 and I understand we're going to have to do this on the fly
10 now, and that makes sense to me. What Your Honor said is
11 perfectly appropriate. But we're going to, then, have your
12 cake and eat it too strategy. You can't say we wanted to
13 introduce things for entrapment defense, but we're not
14 presenting an entrapment defense, and then allow and have
15 the Court try to rule on whether or not --

16 THE COURT: I understand that. I will hear what
17 the purpose is after I heard what your objection is, know
18 what the questions are and what the clip is.

19 MR. SOFER: Understood.

20 THE COURT: I can't do anymore than that. I
21 really can't. I don't think there's a situation where
22 anybody says, Gee, you told us this, Judge; therefore, we
23 did that. If you hadn't told us that, we would have done
24 this. I want the Court of Appeals to understand how
25 difficult this is.

1 And if that kind of situation arises, I want it
2 to have some sympathy for my inability to rule on things
3 with any degree of specificity in the abstract. I will do
4 the best I can to let Counsel know I understand what the
5 general guidelines are, so you can prepare yourself so
6 everybody doesn't waste a whole lot of time preparing to do
7 something that I say first question of 25 anticipated,
8 objection sustained .

9 MR. SOFER: Judge, one other thing, to the extent
10 that we use transcripts tomorrow, I would just ask that we
11 have some mechanism for assuring that the transcript that's
12 being shown to the witness is, in fact, an accurate one;
13 and we can work that out with defense counsel this evening
14 perhaps. But I don't want -- one of the things we've
15 gotten from Counsel for El-Hindi, one of the things we
16 noticed we're getting old versions of our transcripts
17 occasionally back; and of course, they're full of mistakes,
18 because they were very old versions. So, to give the
19 witness an old version is going to cause problems.

20 THE COURT: I agree.

21 MR. IVEY: Your Honor, one other question, I have
22 a question just for my own information. With respect to
23 the trial transcript -- not the tapes and videos and all
24 that other stuff -- I'm getting back and I don't -- I
25 wasn't at the real time presentation. But some of the

1 trial transcript are in numbers with each line along with
2 it, and others have the time counter time. And if I want
3 to use the trial transcript, what is the pro -- which one
4 should I use? Maybe I should --

5 THE COURT: I would assume --

6 THE COURT REPORTER: Page and line.

7 MR. IVEY: So, we need to retrieve that we have
8 just the time --

9 THE COURT: Can I suggest that you talk to Angela
10 or Tracy? Angela will be leaving around 4:30 or so. In
11 other words, talk to them. Make sure everybody has the
12 same version. The IT guy is available.

13 (John Bianco on phone.)

14 MR. BIANCO: I can hear you fine.

15 THE COURT: And can you people hear him?

16 Is it possible where a witness is on the stand
17 and a lawyer wants the witness to hear and to view -- hear
18 a recorded conversation and view concurrently the
19 transcript of that conversation for that not to be heard by
20 the jury and not to be viewed by the jury? Is that
21 technologically -- easily technologically possible?

22 MR. BIANCO: My first -- the transcript that
23 we're watching, both the same computer that the attorney --
24 that they're running through the system, is it on the same
25 computer?

1 MR. SOFER: That's up to the defense, Judge. I
2 don't know. It would be for the Government --

3 THE COURT: Speak into the microphone.

4 MR. WHITMER-RICH: Yes.

5 MR. SOFER: It would be for the Government, and
6 that's what we're talking about.

7 THE COURT: And also for defense counsel.

8 And that's actually what we're talking about now
9 is cross-examination starting tomorrow morning at 8:30.

10 MR. WHITMER-RICH: Yes, it will be one computer.

11 THE COURT: Did you hear that, John?

12 MR. BIANCO: I did not.

13 When we're talking about the transcript, whatever
14 software is being used, they are hearing it and seeing it
15 at the same time coming from the same computer?

16 MR. WHITMER-RICH: Yes, I believe so.

17 MR. BIANCO: So we want just for the witness and
18 no one else in the courtroom to be able to hear and see
19 that?

20 THE COURT: That would be desirable, I think.

21 MR. WHITMER-RICH: Or if counsel can see it and
22 hear it, that's probably acceptable; but perhaps desirable,
23 it would be that the jury not be able to hear it.

24 THE COURT: John, what I'm trying to accomplish
25 is that while it is being heard and displayed to the

1 witness, the lawyers and the other defendants and me, the
2 jury could neither hear nor see; and if that's not
3 technologically doable, that's fine. In other words, I
4 don't expect you to be here by 5:30 with a crew trying to
5 figure out something else in the next 14 hours to
6 accomplish that.

7 MR. BIANCO: I know that there's a way to press a
8 button that will stop the publication of the -- I believe,
9 of the display to the jury monitors.

10 THE COURT: But they still can probably hear it.

11 MR. BIANCO: I'm trying to think if there's a way
12 to have the headsets work but have the audio in the
13 courtroom and everybody else deleted, and I think it -- it
14 might be possible, but I would like to speak with Dave
15 Sendoll real quick, who's not at his desk at the moment.

16 Can I call back real quick?

17 THE COURT: Call Joyce, as you did when you got
18 my voice mail, and she'll send me an IM and I'll call you
19 and maybe David on the phone.

20 MR. BIANCO: But the gist of this is that
21 everybody would have headsets and would be watching their
22 monitors, but the jury could not see anything on their
23 monitor. And they would not have headsets; is that
24 correct?

25 THE COURT: That is correct, and there be no

1 broadcast over the court.

2 MR. BIANCO: Correct. I will get that answer as
3 quickly as possible and get right back to you.

4 THE COURT: Thanks, John. Okay.

5 Okay. The other thing -- at least the other
6 subject you mentioned -- he mentioned three topics in the
7 E-mail to me that everybody got: Stipulations of expert
8 witnesses, general parameters of admissible
9 cross-examination. There's also the El-Hindi Motion to
10 Compel.

11 MR. SOFER: Yes, Judge.

12 THE COURT: Have you seen his response -- their
13 response?

14 MR. HARTMAN: I have seen it. I have not read
15 it.

16 THE COURT: Well, what other general subjects,
17 because we still have a lot of work to do? But what other
18 general subjects?

19 MR. SOFER: The only other thing, Judge, is we
20 will file in the next couple hours our motion.
21 Essentially, it doesn't really ask for anything in
22 particular. It's sort of a legal memorandum on 68, 69.
23 And the Government's general argument there is essentially
24 we've gone into much, if not all of the witnesses sort of
25 negative aspects, things that might bare on his

1 credibility, the things that we believe are --

2 THE COURT: It's my understanding that that rule,
3 when you're talking about an ancillary or extraneous
4 incident or event, the cross-examiner's stuck with the
5 answer.

6 MR. SOFER: That is my understanding as well,
7 Judge; and that is part of what my motion said.

8 THE COURT: At least that's what -- told me 25
9 years ago when I listened to his tape.

10 MR. SOFER: I think that was correct 25 years
11 ago. I think it remains correct today. That's part of
12 what we're arguing.

13 And also, just generally, the Government thinks
14 it would be inappropriate, while certainly if some of this
15 is appropriate for cross-examination to be -- for instance,
16 Counsel remarked to the jury on opening statements that
17 Mr. Griffin had, I don't know, 200 overdrafts or something;
18 but to be going through, I don't think that's quite
19 accurate with the --

20 THE COURT: I understand. They say, Mr. Griffin,
21 you had a history of overdrawing one or more checking
22 accounts, yes or no. If he says no, that's the borderline.
23 You can get really, really egregious, Mr. Griffin, you had
24 an account with Hartford National Bank, number one, two,
25 three, four, five, six during this period. While you had

1 that account, you had 17 overdrafts. If he still says no,
2 then we may have a major problem. I think we all
3 understand the point.

4 And isn't it true that you bounced a check to
5 Target department store in Cleveland, Ohio for \$4.78? And
6 didn't you get charged with that? And wasn't it nollied
7 when you paid for the \$4.78 plus the -- we're not going to
8 go that far, but we'll have to wait and see.

9 But I'll agree with you, we don't engage in a
10 trial of ancillary matters. And on the other hand, clearly
11 flagrant, unmistakable inference of, you know, kind of
12 initial set of questions that I indicated; and you know,
13 we're all sitting saying, Wait a minute.

14 MR. SOFER: Understood. We'll file the motion.
15 As I said, it's sort of a motion that lays this generally
16 out, doesn't really go into a whole lot of very specific
17 issues.

18 THE COURT: To the extent that everybody
19 understands those rules, I think adjourn --

20 MR. SOFER: Understood.

21 THE COURT: Okay. What else in terms of anything
22 else that's on your mind that we haven't talked about yet?

23 MR. SOFER: Nothing, Your Honor. I have a lot on
24 my mind. I probably shouldn't repeat it.

25 MR. HARTMAN: Must be about me.

1 THE COURT: I think there's a lot of possible
2 suspects.

3 MR. TERESINSKI: Judge, he had a guilty
4 conscience.

5 THE COURT: Anybody behind the bar, and Angela
6 and Tracy and Amy are not above them.

7 MR. TERESINSKI: Mr. Hartman had a guilty
8 conscience.

9 THE COURT: On your Motion to Compel, you haven't
10 read their opposition?

11 MR. HARTMAN: I have not.

12 THE COURT: What I would like to do, then, is to
13 step down; and before too long but without setting a time
14 limit on it, if you could take some time to read that
15 because I would like to address that and at least get that
16 resolved today --

17 MR. HARTMAN: Sure.

18 THE COURT: -- if you could.

19 Also, Mr. Whitmer-Rich, you and somebody from the
20 Government, perhaps Mr. Herdman, to the extent that there
21 are definitions that remain in dispute, if you could talk
22 those through at least be in a position to tell me what
23 they are; and if possible, I'd like to read them to the
24 jury tomorrow. If we can't, we can't. The next
25 appropriate time would seem to be at the conclusion of

1 Mr. Griffin's testimony.

2 I'd also like -- with regard to any tapes that
3 we're going to hear tomorrow or the next day or this week,
4 I think that there are none; but as to which there are
5 audibility disputes to have those keyed up to get resolved
6 this afternoon. And I would very much like -- to the
7 extent that you're able to do so, continue audibility
8 disputes and give you time to talk through at least
9 whatever you can now just to see if they're really there,
10 resolve those today as well. So, we'll take advantage of
11 the next two or three hours, if we can.

12 So, Motion to Compel, definitions and, I guess,
13 audibility, those are the three things I just went through.
14 Okay.

15 MR. HARTMAN: I'm not sure, Judge, that we're in
16 a position to talk about audibility, because we haven't
17 been told yet what we think is wrong. I intend to talk to
18 the Government tonight see if we can work it out.

19 THE COURT: Okay.

20 MR. HARTMAN: But --

21 MR. SOFER: Again, Judge, for hopefully the last
22 time, we -- when we get a list of something that we can
23 understand and listen to and analyze, we can get back to
24 counsel and do that. We've been asking for that for a long
25 time. We have still not received it. We've been receiving

1 transcripts as late as nine minutes before we walked --

2 THE COURT: I thought Mr. Hartman said that
3 they've given you about 90 percent of the designation. By
4 designation, I mean this segment of this conversation along
5 with a transcript that they want to show to the jury.

6 MR. SOFER: We received that chart, which is
7 incomplete, sometime -- I don't know what time you sent it
8 yesterday.

9 MR. HARTMAN: Several times, but most recently at
10 11:40 today.

11 THE COURT: Look, you know, as I say, it's your
12 weekend too. If we have to wait until the weekend to do
13 this, okay. We've got a few hours, couple hours anyway;
14 but if you don't want to spend it -- but aren't able to
15 spend profitably if not, that's fine.

16 At some point, we've got to do -- Mr. Ivy, is
17 Exhibit A -- we had what we expected to be a whole bunch of
18 problems; and they got resolved, because people took the
19 time to talk to each other.

20 MR. SOFER: And again, Judge, that was because to
21 their credit, the Amawi team got us a -- something we could
22 look at and move quickly on. We've yet to be able to do
23 that.

24 MR. BOSS: On a practical level, our audiovisual
25 gentleman's not here at the moment. I think they're still

1 synchronizing -- trying to synchronize those transcripts
2 with the segments. So, even if we wanted to go forward, we
3 don't have the equipment or the individual to do so.

4 THE COURT: The final thing is that I will
5 encourage Mr. Amawi's counsel and Mr. Doughten, certainly
6 Mr. Amawi's counsel, for tomorrow to be prepared to
7 present -- if you want to recall Mr. Griffin conversation
8 to be prepared to show him the written transcript at least
9 as a back up to the -- to the technology version. I'm
10 concerned that we might not be able to keep the jury
11 unaware of what's being played.

12 MR. SOFER: Great, Judge.

13 THE COURT: Okay. So, I guess read the Motion to
14 Compel, look at the definitions and let me know when we can
15 get back to work.

16 (A brief recess was taken.)

17 THE COURT: We're on the record. Angela, thanks.
18 On the Motion to Compel, what remains at issue?

19 MR. HARTMAN: Well, first, Judge, I want to make
20 clear, we've requested the recording of a two, one
21 conversation that was testified about. We had a sidebar,
22 and the Government pointed out that Mr. Griffin was
23 mistaken. There was no recording made that day. That's
24 fine. I'm going to throw out that request. The 302s, the
25 draft versions, I'm withdrawing that request as well.

1 What remains is the original version of Exhibit
2 61, which the Government, I believe, is going to say on the
3 record does not exist, and the E-mails between
4 Mr. Griffin -- Mr. Griffin and the Government.

5 THE COURT: And with regard to the -- those
6 E-mails, I would think that they're properly discoverable.
7 We all have to rely on the Government doing it's Brady and
8 Giglio job. So, that motion will be denied as to that.

9 What was -- I'm sorry. And is there still
10 something else? I got a little confused in the colloquy
11 before Angela came in.

12 MR. GETZ: In regards to Exhibit 61, I think
13 there's a Motion to Compel for the Government to produce
14 the original; and the Government is stating that it does
15 not have in its possession the original of that -- that
16 item identified as Government's Exhibit 61.

17 MR. HARTMAN: The allegation is that Mr. El-Hindi
18 gave Exhibit 61 to Mr. Griffin in paper form. The
19 Government does not have the paper form. That's the
20 only --

21 THE COURT: Okay. On the definitions, where are
22 we with that?

23 MR. SOFER: Judge, my understanding is that
24 although we were able to work these definitions out with
25 two out of three counsel -- two out of three isn't bad

1 sometimes -- we are unable with respect to many of them to
2 come to an agreement with Counsel for Mr. Amawi.

3 Our suggestion is -- because, I think, these two
4 issues are so closely interlinked, is to go forward as
5 expeditiously as possible about Your Honor's rulings on the
6 expert testimony from Mr. Amawi. And we'd ask that you do
7 that one night this week if at all possible, because I
8 think that that will then tell the Government what we are
9 supposed to do.

10 I just would note for the record that leaving
11 these terms undefined, I think, hurts the Government's case
12 and perhaps even helps defense case, which is why we are --
13 since we carry the burden are so interested in getting them
14 defined. As I said, we were able to work that out with two
15 out of three counsel, but are apparently a long way off on
16 too many of these terms for counsel for Amawi.

17 MR. WHITMER-RICH: We'd agreed on many of them.

18 THE COURT: I'm going to go through one by one
19 and see what the problems are, and I will decide whether or
20 not if we can make any progress. If we can't, we can't.
21 I've downloaded a copy, so I'm set to go.

22 MR. BOSS: Judge, if these are the last issues
23 that we're dealing with, the stipulations --

24 THE COURT: Give me half a second. I've got to
25 tell Tracy that she may be needed at 5:00. She's with

1 Judge Zouhary.

2 MR. BOSS: I've reconsidered, Judge. I was going
3 to ask to be excused, so Mr. Hartman can get working on our
4 segments; but I have reconsidered.

5 THE COURT: I think it's probably better that you
6 stay.

7 MR. WHITMER-RICH: Sorted by topic, by first
8 geographic locations or alphabetic locations.

9 THE COURT: Why don't we do by topic.

10 MR. WHITMER-RICH: In the geographic locations,
11 the only objection as to Abu Ghraib.

12 THE COURT: What's the problem with that?

13 MR. WHITMER-RICH: The problem is it describes
14 what happened under Saddam Hussein imprisonment and
15 torture, political opponents and common criminals; and it
16 describes what the United States did at Abu Ghraib as a,
17 quote, series of abuse, unquote. It would be factually
18 accurate to state that while the United States used it as a
19 detention facility, there was also torture and killing of
20 suspected insurgents and terrorists.

21 The Government, I'm not surprised, is not willing
22 to stipulate to that. But it's a very charged subject, I
23 think; and it's one that's, I think, understandably
24 difficult to reach agreement on.

25 MR. HERDMAN: And Your Honor, I would say at the

1 outset that this particular term Abu Ghraib is one that we
2 discussed with the Masloun team in particular. We've
3 already -- the way we were going to phrase this particular
4 definition, and I think -- I think our problem with this is
5 that we've conceded that there were a series of abuses
6 there, and I'm not aware personally nor has anyone from our
7 prosecution team --

8 THE COURT: What about this Abu Ghraib is the
9 site of a prison used by the regime of Saddam Hussein and
10 thereafter by U.S. military personnel.

11 Do we need to say anything more than that for any
12 reason at all?

13 MR. HERDMAN: No, not -- can you repeat it again,
14 Your Honor.

15 THE COURT: Just Abu Ghraib is a site and prison
16 used by the regime of Saddam Hussein and thereafter by U.S.
17 military personnel.

18 MR. HARTMAN: Provided nobody's going to make an
19 issue of the Fatima letter that came out of there. We're
20 not; but if anybody is, then something should be said.

21 THE COURT: Is Mr. Doughten here? There you are.

22 MR. DOUGHTEN: We're fine with that, Your Honor.

23 MR. WHITMER-RICH: That's fine with us,
24 Your Honor.

25 MR. HARTMAN: Okay.

1 THE COURT: Okay. Next as to which --

2 MR. HERDMAN: Your Honor, just to back up, Abu
3 Ghraib, I believe, also is a city.

4 THE COURT: It's a city in Iraq located just west
5 of Baghdad. Abu Ghraib is a site -- or actually probably
6 the location. I'm going to say Abu Ghraib is a city
7 located just west of a city in Iraq just west of Baghdad,
8 never want to inform any English -- the city in Iraq just
9 west of Baghdad in which is located a prison used by the
10 regime of Saddam Hussein, thereafter U.S. military
11 personnel.

12 Okay. Next disputed definition.

13 MR. WHITMER-RICH: In the Arabic terms, the only
14 dispute is as to Jihad. Right now there's a very lengthy
15 paragraph definition, and there's just a lot in there. And
16 we find it problematic to just stipulating to a very
17 lengthy detailed definition. We don't agree with all parts
18 of it. We -- means to fight, for example --

19 THE COURT: Pardon me. I interrupted you. I
20 apologize. What -- I interrupted. I didn't hear what you
21 said.

22 MR. WHITMER-RICH: We just have -- we have
23 problems in the lengthy paragraph definition to be given
24 there. We don't think that the translation that it
25 doesn't -- that it's not translated as to fight, an Arabic

1 word that means fight. We had originally proposed simply
2 the Arabic translation, which is to struggle or strive. I
3 have a two-sentence additional definition that we would
4 agree with.

5 THE COURT: Let me hear what that is.

6 MR. WHITMER-RICH: If I can find it, Your Honor.

7 MR. HERDMAN: Your Honor, originally, the
8 Government had proposed a two-sentence definition as well;
9 and Mr. Masloum's counsel opposed. This actual definition
10 is taken directly from the Oxford Dictionary of Islam, and
11 it is longer. It's certainly not one that the Government
12 is entirely enamored with, but we can live with it for the
13 purposes of this trial. It is long; it's true. But I
14 think that it covers every potential context in which that
15 word can be viewed.

16 MR. DOUGHTEN: Your Honor, our position was this
17 definition came out of an independent source; and I think
18 that the parties want to be able to argue that it means
19 something different within the context that it's used. And
20 I think this definition allows all parties to argue what
21 they believe the context was. The Government can argue
22 holy war. We can argue doing Allah's work. And you know,
23 over simplification perhaps, but I think that it gives the
24 jury the background to make a decision, so we're
25 comfortable with this definition.

1 MR. HERDMAN: And that was our position as well,
2 Your Honor.

3 THE COURT: And this is not -- I recall the red
4 pen of this on Sunday.

5 Does this incorporate my edits, whatever they
6 were?

7 MR. HERDMAN: You did not edit this particular
8 term --

9 THE COURT: Okay. That's fine.

10 MR. HERDMAN: -- on Sunday.

11 THE COURT: But it is verbatim from the Oxford
12 English Dictionary or Oxford -- the Oxford Arabic --

13 MR. HERDMAN: Oxford dictionary of Islam.

14 THE COURT: Oxford Dictionary of Islam.

15 Why isn't the point that they make well-taken
16 that this, assuming that it's accurate or at least
17 authoritative, it does seem to me to provide an opportunity
18 for parties to argue as to what may have been done in a
19 particular context, and I remain more than willing to
20 instruct the jury, if the parties wish me to, that Arabic
21 is a contextually -- context is important in Arabic.

22 Would you like some time to talk about that
23 further?

24 MR. WHITMER-RICH: Why don't we skip ahead and
25 maybe come back to this one, Your Honor?

1 THE COURT: Candidly, all I'm saying, this seems
2 to me to be a -- very fair because, you know, it talks
3 about, as I understand it, the Jihad that may involve
4 somebody's personal effort to control his own passions and
5 emotions and human inclinations and spiritual contacts.
6 And it also covers the idea that Jihad is an armed struggle
7 against -- in furtherance of Islam, or in furtherance of
8 some other approved goal. So, why don't we -- we'll hit
9 the pause button on that. Mr. Amawi, look at it, and let's
10 move on down the road.

11 MR. WHITMER-RICH: Let's see. I believe that
12 the -- in the groups, organizations and institutions.

13 THE COURT: Let me just ask: On Qur'an, I
14 realize you all agree with this. But do you want to use
15 the English variance of Qur'an? I know that's not
16 contemporary, doesn't matter?

17 MR. HERDMAN: I believe we used this spelling
18 because it's the way it was translated in the recordings.

19 THE COURT: Whatever, doesn't matter to me. I
20 think everybody understands.

21 MR. HERDMAN: I'm fairly certain that's how we
22 spelled it.

23 THE COURT: Yeah. Go ahead.

24 MR. WHITMER-RICH: On groups, organizations and
25 institutions, a sort of general objection to describing

1 that as engaging in terroristic tactics.

2 THE COURT: That is something that I added.

3 MR. WHITMER-RICH: Right. I understand.

4 THE COURT: Do you have a -- let me get down
5 there.

6 MR. WHITMER-RICH: It first shows up, I believe,
7 in, say, number three Al Mujahadin Army. So, the second
8 sentence would be content with the first sentence. We
9 would seek to exclude the second sentence.

10 MR. HERDMAN: And Your Honor, this is one of
11 those examples where the Government has conceded I would
12 say quite a bit in terms of allowing the description
13 insurgent group to be implied to some of these
14 organizations, for instance, Al-Qaeda and Iraq.

15 THE COURT: Well, I'll tell you, if this is not
16 an acceptable definition, if you want to call Mr. Kohlmann
17 to testify to that issue based upon his knowledge, I'll let
18 you do so and ask counsel to let -- in light of that
19 statement on my part, because I think it's entirely
20 appropriate. The nature of the activities of some of these
21 groups, even though it may not be linked in a sense of
22 agency, with any of the defendants, and it's quite clear to
23 me, nonetheless, to the extent that they have been
24 referenced, I think, is appropriate to let the jury know
25 this is, in a very general sort of way, the kind of group

1 that this is. And then if defendants want to introduce
2 expert testimony that that's not true, that's fine.

3 And as I think I indicated in my opinion with
4 regard to Mr. Kohlmann, he's clearly qualified. He's
5 probably as knowledgeable as anybody could be so far as I
6 can tell about much of what he says. And I think to
7 permit -- to permit the jury to be told very briefly, very
8 pointedly the nature of the activities. And I do also
9 think, though, and I would ask that it be referred to as an
10 insurgent group as I tried to draw kind of a distinction
11 between the overall character of the group and the nature
12 of some of the things that it does.

13 MR. HERDMAN: And Your Honor, my response would
14 be --

15 THE COURT: Let me just say, following the
16 Israeli incurring Lebanon over a year ago or whenever it
17 was, one could have described the mosque as a -- a group
18 devoted to the reconstruction of the facilities in Lebanon.
19 Okay.

20 MR. HARTMAN: Can the defense have a minute to
21 confer?

22 THE COURT: Sure. Just -- just -- and I will
23 just like an opportunity -- one minute. What I'd like to
24 do is go through this and let you know. And then so you
25 can talk amongst yourselves after that, and I'm not going

1 to cut that off. I'm just saying, in this instance, as I
2 understand the evidence, to permit Mr. Kohlmann simply to
3 testify, you know, what is -- or what is or was Al
4 Mujahadin Army, number three.

5 MR. HERDMAN: There's several in this section,
6 Your Honor. Can I say in response to that, I can't say
7 that Mr. Kohlmann will testify that the Mujahadin Army is
8 an insurgent group. He would be able to testify that it is
9 a group, an organization of some sort; and I think he would
10 also -- we proffer his testimony that this particular group
11 has a responsibility for activities or beings, if you want
12 to describe them in a neutral way.

13 THE COURT: But if it has, that's fine. Maybe
14 what we should do is sort of have a little preview of
15 the -- you can look at his report or whatever, or we can
16 do -- I'm not trying to prescribe specific. I'm just
17 saying --

18 MR. HERDMAN: I understand, Your Honor. I just
19 wanted to make that clear.

20 THE COURT: And certainly, if that's not accurate
21 just -- just -- and I actually -- I can't say -- he may --
22 he may say his groups are part of the, quote, insurgency;
23 but he may also describe some activities.

24 I'm trying to defuse the issue of, quote,
25 terrorism as infusing this whole case. I mean, let it be

1 within the case -- within the -- in the right to pro --
2 proper role or proper place. That's what I'm trying to
3 accomplish with this. If it -- this doesn't work, that's
4 fine; and I'll let both sides -- we'll have a checklist.

5 And if you want to call an expert and say that's
6 not true, that's not what this group is about and this is
7 how I know that's not what it's about, that's fine.

8 Hi, Tracy. Do you want --

9 (A brief recess was taken.)

10 THE COURT: Okay. Which is next?

11 MR. WHITMER-RICH: To report back on the
12 little -- I think that we -- I guess we will. We're going
13 to change our position; and we'll restipulate to, I think,
14 most of this maybe with a few --

15 THE COURT: Let's be real, real careful, because
16 I think probably -- I think more appropriately to present
17 this and to have the record show and is -- that you agree
18 that I may present these, I may instruct the jury as to
19 these definitions. Okay. We'll -- it may not be that
20 different from, quote, stipulate; but particularly, in view
21 of the Government's situation where they have no objection
22 in this case and this case only to doing some; or even the
23 case of the Government, its objection. I'm very reluctant
24 to go over the objection of the defendants.

25 MR. WHITMER-RICH: I understand the -- I haven't

1 I guess thought through this --

2 THE COURT: That's fine. I don't want you to
3 stand up here and make a representation that's hasty, okay,
4 because we can wait a little bit.

5 MR. WHITMER-RICH: But whatever we call them --
6 definitions, what have you -- I think we can probably agree
7 to -- to a lot of this. I think we'll get to agreement.

8 THE COURT: And --

9 MR. WHITMER-RICH: The concern, I suppose, is
10 that, you know, we feel that we have, as I said earlier,
11 retained experts who are competent enough in their fields,
12 who have extremely relevant testimony to provide in this
13 case and that our willingness to agree to certain
14 definitions does not preclude their testimony in any way.
15 Your Honor will make a decision regarding these experts,
16 whether it's tonight or tomorrow night or whenever.

17 THE COURT: I assume Saturday.

18 MR. WHITMER-RICH: But by agreeing to certain
19 definitions, we're -- we don't think that in any way
20 mitigates our right on behalf of Mr. Amawi presenting a
21 defense to call experts to testify on relevant and
22 important matters. That's simply for the record.

23 THE COURT: I don't consider it a waiver. I'm
24 just saying, as I said before, I'm not going to let any
25 expert, whether it's Mr. Kohlmann or yourself or whoever,

1 say what do you understand the meaning of X to be if X
2 already told the jury what they are to understand X to be.

3 On the other hand, if I were to, I don't know,
4 permit your witness -- and this is total speculation. And
5 I can't remember his name, but there is a student in the
6 history of the origins and development of Islam and its
7 various branches and different kinds of believes and so
8 forth. Then, are you familiar with the term Jihad? Yes.
9 And can you give us a historical example as to Jihad? I
10 think it would say, no, you can't do that.

11 If I let that witness testify to that point, is
12 it somehow, otherwise, relevant and permissible? But I
13 wouldn't want to say a Jihad is something that either took
14 away from or added to or whatever definition that they gave
15 you. That's all.

16 And I know that's a pretty thin line, but that is
17 one that I would expect to hold very firmly to. And that
18 presumes that the testimony of that expert, whoever it
19 might be, will be as a general matter, admissible.

20 MR. SOFER: Your Honor, I just think we have to
21 be -- I think Your Honor's instincts are right that we have
22 to be very careful with this. Again, the Government's
23 position is we will go forth with what we believe that
24 these agreements, these definitions were. We think we've
25 conceded significant grounds on some of them if and only if

1 there's not going to be an elaborations.

2 And the example that you just gave, I think, is
3 an excellent example of something where you would
4 essentially have an elaboration, give us some examples
5 historically of Jihad. Now, the defense witness I'm, of
6 course, speculating says some benign nation -- battle of
7 nations or other conflict. Well, we -- we have experts who
8 are able to explain what's going on in Iraq right now is a
9 good example of Jihad.

10 THE COURT: Let me, if I can, interrupt. Were
11 that to happen, I can assure you that you would have every
12 opportunity in rebuttal to call your experts. And the jury
13 has been told Jihad is whatever and that there as
14 historical examples. And the expert I assume said, Yes
15 that's correct. That's the kind of activity that other
16 historical examples that you are familiar with. Yes. Tell
17 the jury what those are. Number one, I'm going to try to
18 avoid that kind of pushing of the boundary, or that
19 territory gets entered into, then, by all means in
20 rebuttal, which, of course, will be the last thing the jury
21 hears on any subject. I would absolutely let you call
22 somebody and testify.

23 MR. SOFER: Again, I was just -- I'm just trying
24 to figure out the parameters of this.

25 THE COURT: Okay. Okay. Next.

1 MR. WHITMER-RICH: I guess I would say with our
2 new position without really putting --

3 THE COURT: You want to -- you want to quit now
4 and talk about it tomorrow night?

5 MR. WHITMER-RICH: I believe that by -- within 24
6 hours, I can either agree to what's here or just maybe a
7 few minor little tweaks that we want.

8 MR. HERDMAN: To that end, Your Honor, we stated
9 earlier that the Government's conceded quite a bit in terms
10 of arriving at these definitions, in fact, to such an
11 extent because I was the one who sort of let the cows out
12 of the pasture. I have to try to get them back into the
13 barn now to some extent.

14 THE COURT: And I'm trying to close the gate, so
15 the ones that are out there --

16 MR. HERDMAN: I'll try not to step into anything
17 on the way back to the barn. So, what I would say is there
18 are a couple of minor edits that --

19 THE COURT: Why don't you go over those?

20 MR. HERDMAN: -- that suggested that we make to
21 eight terms. I can say them now, or I can E-mail them
22 around tonight so everyone gets a chance to look at them.
23 Either way I can --

24 THE COURT: Tonight's Tuesday, right?

25 MR. TERESINSKI: Yes, Your Honor.

1 THE COURT: I know it's not a Saturday or Sunday,
2 I know that much. Of course, this Saturday will probably
3 feel like a Wednesday. Why don't we do this? I mean, I
4 think we may be making progress; and if we're not, then
5 I'll be in a position -- obviously, I keep talking about
6 Jihad.

7 Jihad's obviously a fundamentally important term,
8 and you might think about saying each of you is going to be
9 able to call somebody, probably Mr. Kohlmann, to talk about
10 what Jihad is. And you've got a linguist who's going to
11 say the same thing, and you may have somebody -- and that
12 may be the kind of thing that you can't deal with in this
13 shorthand, simple fashion; and that's fine.

14 Okay. Mr. Sofer, I hope you would have -- I hope
15 everybody has -- I'll try to be as fair to everybody as
16 possible, give them the chance; and if they get the
17 chance -- you get the chance -- if you get the chance, they
18 get the chance. That's my job.

19 MR. SOFER: I think, Judge, we do think you're
20 trying to be fair; and I hope I've never said otherwise.

21 THE COURT: No. No, not at all.

22 MR. SOFER: Just involved in a certain way that,
23 I think, it's important that the record reflect that. The
24 Government brought forth an expert. The defense said that
25 this expert should --

1 THE COURT: Succeeded to knock him out.

2 MR. SOFER: Under relevance grounds, they, then,
3 come back and have proffered several experts, which I think
4 are -- are of the same flavor. Perhaps I would venture to
5 say even more outside of any argument that has been made
6 with Mr. Kohlmann.

7 THE COURT: Sometime on Friday after we get the
8 audibility stuff done, we're going to deal with the
9 experts. Saturday. Saturday.

10 MR. SOFER: I'll tell you something else I'm a
11 little worried about, we don't want to call them
12 stipulations -- defense I'm not sure necessarily wants to
13 call them stipulations. We have to know that there is a
14 legal basis upon which to give definitions to the jury if
15 it doesn't fall into a stipulation category. We might be
16 able to get to the place -- I hope we'll be able to get to
17 a place where we can stipulate between the parties.

18 THE COURT: Well, the legal basis would be that
19 neither party objects to my doing it.

20 MR. SOFER: Understood.

21 THE COURT: I'm serious about that. I hereby
22 instruct you A, B, C, D and E.

23 MR. SOFER: You can't do that if one of our
24 conditions that's imposed on us is that the Government
25 objects. So, again, all I'm saying, we'll work on this.

1 We'll see what we can do. I have to think that the vast
2 majority of these terms we should be able to stipulate to.
3 Between the problems that we're encountering in Washington
4 and the problems perhaps with the defense team, I think we
5 will have to fill in with expert testimony; and again, to
6 the extent that the Court's willing to review that original
7 decision.

8 THE COURT: That's what I'm talking about. By
9 the time we go home tomorrow night, I intend to expect that
10 at about this time tomorrow, you'll tell me number 72,
11 number 13. This is us. This is us. And I will either
12 say, as I did with Abu Ghraib, try to suggest a definition,
13 except I think with those little hard kernels, the wheels
14 of my mind probably won't grind strongly enough to overcome
15 the problem. And if so, we'll figure out how we go about
16 doing that.

17 But I would like to get as much of this as
18 humanly possible for both of you to cut down on the risk of
19 testimony offered that comes in for a narrow purpose simply
20 spilling over and adversely to the jury in either
21 direction.

22 MR. SOFER: Understood.

23 THE COURT: Okay. What else tonight, if
24 anything, that we should talk about or that you hope to
25 talk about before we showed up?

1 MR. SOFER: I'll just say, Judge, that we are
2 filing -- if we have not already, in the next hours, we
3 will file this motion regarding the general parameters of
4 cross-examination, just ask the Court and counsel to look
5 at it before tomorrow, because to the extent that we object
6 tomorrow, it will be based largely upon this document.

7 THE COURT: It will give us a heads-up of what
8 you may be complaining about.

9 MR. SOFER: Exactly. It's what I described
10 before this notion of extrinsic proof.

11 THE COURT: Could you do me the favor and make
12 sure that you E-mail a copy tonight. Because if it gets
13 filed, I won't see it until tomorrow.

14 MR. HERDMAN: It will be filed under seal.

15 Even though Mr. Griffin testified to the vast
16 majority of these items on his direct examination, there is
17 one discreet item that is known to defense, I believe, and
18 probably is in the report as well. It's not -- has not
19 been testified to yet.

20 THE COURT: May I suggest something?

21 MR. HERDMAN: Yes, Your Honor.

22 THE COURT: File the principal document with an
23 attachment under seal rather than the whole thing.

24 Can you do that?

25 MR. HERDMAN: I know we can.

1 THE COURT: Just say also submitted here with
2 this is an additional attachment as to one item under seal.
3 That way I just want the -- don't want the press knocking
4 on my door, because then we do have ancillary --

5 MR. HERDMAN: I understand.

6 THE COURT: But anyhow, send me a copy, just send
7 me an E-mail of the whole thing, please. I'll look at it
8 tonight.

9 Okay. Anything else from the Government?

10 MR. SOFER: We're done, Judge.

11 MR. HARTMAN: We were done a while ago, Judge.

12 THE COURT: No, you're not. You've got some
13 transcripts and designations to deliver, Mr. Doughten.

14 MR. DOUGHTEN: Nothing further, Your Honor.
15 Thank you.

16 MR. WHITMER-RICH: Nothing further, Your Honor.

17 MR. SOFER: Actually, Judge, that reminds me. I
18 just, again, want to put on the record now, since we've
19 been sitting here today, we received, I think, it's four
20 additional clips from the defense on the Amawi team. And
21 we are -- we've already sent word back to the ranch to
22 process these.

23 THE COURT: Did they -- are there differences
24 between your transcripts and theirs? Do you know?

25 MR. SOFER: At least two of them, I think, are

1 the Government --

2

3 MR. WHITMER-RICH: They are from Government
4 transcripts that we provided.

5 THE COURT: Okay. Then, they shouldn't be
6 that --

7 MR. WHITMER-RICH: They're short.

8 THE COURT: The deviation problem shouldn't be a
9 problem.

10 MR. SOFER: Hopefully not, Judge.

11 THE COURT: Okay. Okay.

12 MR. SOFER: Now we're done.

13 THE COURT: Good luck on all your homework
14 assignments. Papers will be turned in at 8:30 tomorrow.
15 Thank you.

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

s:/ Angela D. Nixon

Angela D. Nixon, RPR, CRR

Date